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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALTERNATIVES COMMUNITY MENTAL HEALTH CENTER, INC.,

Plaintiff,

vs.

FRONTIER INSURANCE COMPANY,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE AND OPPOSITION TO MOTION TO LIFT STAY

Case No. 3:01-cv-294-JKS

Alternatives Community Mental Health Center, Inc. ("Alternatives") by and through its attorneys, Dorsey & Whitney LLP, hereby files its Reply to Frontier Insurance Company's ("Frontier") Response and Opposition to Alternatives' Motion to Lift Stay.

I. INTRODUCTION

The impetus for the instant motion was the decisions of two United States District Courts addressing the propriety of the New York Supreme Court's Order of October 15, 2001 enjoining the commencement or continued prosecution of lawsuits against Frontier while in rehabilitation.[1]

[1] *Love v. Frontier Ins. Co.*, 526 F. Supp. 2d 859, 861 (N.D. Ill. E.D. 2007); *Spencer v. Frontier Insurance Co.*, C/A No. 3:02-3431-JFA (November 2005) (attached as Exhibit A to Treptow Affidavit filed June 18, 2008).

Both decisions raised multiple due process concerns about the New York Supreme Court's injunction. The *Spencer* decision lifted the stay that the United States District Court for the District of South Carolina had entered earlier. In *Love*, the United States District Court for the Northern District of Illinois denied Frontier's motion to dismiss the litigation based upon the New York Supreme Court's Order of October 15, 2001.

Relying on those decisions as well as the Ninth Circuit's decision in *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Illinois*, 421 F.3d 835 (9th Cir. 2005) and Alaska law, Alternatives moved to lift the stay imposed by this Court on January 8, 2002. Alternatives' motion raised a number of substantive legal arguments as to why this Court should lift the stay. Basically, it was Alternatives' position that: (a) Alaska law does not permit an insurer in rehabilitation to stay proceedings indefinitely, and (b) no legal justification existed for continuing the stay. Both of Alternatives' arguments were grounded on due process considerations.

In response to Alternatives' motion, Frontier simply filed the affidavit of Henry Neal Conolly.[2] That affidavit does not address any of the legal arguments raised by Alternatives in its motion. The Conolly affidavit does, however, provide several additional factual assertions that Alternatives believes fully supports its motion and will be discussed briefly below.

[2] The Conolly affidavit does not meet the requirements of LR 7.1(a)(1) and (2) for an opposition to a motion. Accordingly, Frontier has failed to oppose the motion. Alternatives' motion is thus deemed "well taken." *See* LR 7.1(d)(1).

II. FRONTIER HAS BEEN LESS THAN FORTHCOMING WITH ALTERNATIVES AND THIS COURT ON THE STATUS OF REHABILITATION

A. Conolly's Affidavit

The affidavit of Henry Neal Conolly is illuminating on several points: (1) Certain parts of the New York Supreme Court's original rehabilitation Order, dealing with injunctions, have expired; (2) On May 10, 2004 the New York Supreme Court entered an Order permitting claims, like those filed by Frontier, "to be addressed and determined" by the rehabilitator; (3) Frontier has paid out in excess of $500 million in claims during the rehabilitation process; and (4) the administrator has no idea when the rehabilitation process will end.

B. The New York Court's May 10, 2004 Order

Mr. Conolly indicates, at paragraph 4 of his affidavit, that "upon receipt of the 'Motion to Lift Stay' that is the subject of this proceeding, I immediately emailed and wrote a letter to the Plaintiff's counsel on June 24, 2008 addressing several factual allegations made concerning reinsurance and the status of the rehabilitation of Frontier, and I pointedly advised counsel that Frontier would consent to the presentation by counsel of his client's claim within the New York Supreme Court ordered Interim Procedure."

The Order Mr. Conolly refers to is attached as an exhibit to his affidavit. The Order in question is dated May 10, 2004. Alternatives just learned of this notice on June 24, 2008 (*see* Treptow Affidavit filed herewith). It was only after Alternatives filed the instant motion that Mr. Conolly sent notification to Alternatives of the procedure that is in place to supposedly address its claims.

The question naturally arises as to why Mr. Conolly waited over four years to advise Alternatives and this Court of the New York Supreme Court's May 10, 2004 Order. Frontier sought the protection of this Court in 2001 and the Court signed the Order staying the litigation on January 8, 2002. The Court further ordered that Frontier was to report on the status of the rehabilitation every six months. If the procedure referenced in the Conolly affidavit really offered Alternatives a meaningful way of resolving its claim against Frontier, why did it take the administrator for Frontier four years, and a motion to lift the stay, to provide this information to Frontier and the Court? Alternatives can only conclude that this procedure is not a substantive or a viable alternative to litigation. Otherwise, Alternatives and the Court would have heard of it long before this.

C. Frontier Has Had at Least $800 Million Available During Rehabilitation

Mr. Conolly points out that Frontier has "paid claims in excess of $500 million" during rehabilitation. (Conolly Affidavit at ¶ 5.) In its motion, Alternatives pointed out that Frontier had entered into a reinsurance agreement with National Indemnity Insurance Co. in 1999 that provided Frontier with in excess of $800 million of reinsurance. Apparently, Frontier has now gone through over half of that money. Clearly, financial resources are available to Frontier to pay Alternatives' claims.

Despite having paid over $500 million in claims, Frontier does not indicate to this Court what is either the number of claims left to be resolved or the possible dollar value of those claims. Frontier has now been in rehabilitation almost seven years. One would assume that Frontier has not written any new insurance since it went into rehabilitation. That being the case, the reinsurance funds are being eroded while this litigation is being stayed.

D. Apparently the End of Rehabilitation is Not in Sight

Undoubtedly the most troubling aspect of Mr. Conolly's affidavit is the statement that "no one can make a prediction as to the ultimate outcome of the rehabilitation case …." (Conolly Affidavit at ¶ 5.) As Alternatives pointed out in its moving papers,

> The goal of rehabilitation is to continue rehabilitation is to continue the relationship between the insurer and the insured by protecting the insured's interest during financially impaired times of the insurer … A rehabilitation proceeding modifies and monitors the operation of an insurer with the interests of policyholders. The insurer and rehabilitation continues to keep policies in force, pay claims, remove policies, accept premiums and, in short do everything that insurance companies do.

Eden Financial Group, Inc. v. Fidelity Bankers Life Ins. Co., 778 F. Supp. 278, 282 (E.D. Va. 1991).

The Court, in *Spencer v. Frontier Insurance*, pointed out:

> This court has in interest in the fair and efficient administration of justice for litigants residing within this district. The plaintiff has waited almost three years for his day in court and under the procedures in place in the New York rehabilitation action there is no end in sight. At oral argument, defendant was unable to provide the court with even an estimated time frame in which rehabilitation of Frontier may occur.

(Treptow Affidavit filed June 18, 2008, Exhibit A at p.3.) The Court's Order in *Spencer* was dated November 10, 2005 – almost three years ago. There has been no change in Frontier's rehabilitation status and there does not appear to be "any light at the end of the tunnel." These factors mitigate strongly in favor of granting this motion.

III. FRONTIER HAS FAILED TO OPPOSE THE INSTANT MOTION

Apparently it is Frontier's position that Plaintiff's Motion to Lift Stay should be denied and that the Court's January 8, 2002 Order should remain in effect. That being the case,

LR 7.1(a)(1) and (2) require Frontier to file "a concise statement of the decision sought by the … opposing party" and "a brief statement of points and authorities relevant to the relief requested." Frontier has failed to meet the requirements of LR 7.1(a)(1) and (2).

The failure to include proper materials in opposition to a motion as required by the rules subjects the motion to summary ruling by the Court. *See* LR 7.1(d). The Court is thus in a position to rule on Alternatives' motion.

Alternatives has advanced several well-reasoned arguments, based on sound legal precedent, as to why the New York Supreme Court's injunction should not be enforced by this Court. Accordingly, Alternatives' motion should be granted.

IV. CONCLUSION

Alternatives has conclusively established that: (1) Alaska law does not permit either an unlimited rehabilitation period or an injunction in perpetuity; (2) Alternatives has been unfairly prejudiced in that Frontier's assets are being dissipated with no end to rehabilitation in sight; (3) no legal justification exists for the stay remaining in effect – (a) New York law does not apply and Alaska law requires an insurer to move forward out of rehabilitation; (b) the New York injunction is not entitled to Full Faith and Credit or comity; and (c) there is no reason to abstain from hearing this case on the merits.

Based upon the foregoing, Alternatives respectfully requests the Court to lift the stay it imposed on January 8, 2002.

DATED this 7th day of August, 2008, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

This certifies that on this 7th day of August, 2008, a true and correct copy of the foregoing document was served electronically on:

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